

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CITY OF BURLINGTON; CITY OF
MOUNT VERNON; SKAGIT COUNTY
DIKE, DRAINAGE AND IRRIGATION
IMPROVEMENT DISTRICT NO. 12;
SKAGIT COUNTY DIKE DISTRICT NO.
1; and SKAGIT COUNTY DIKE DISTRICT
NO. 17,

Petitioners,

v.

SKAGIT COUNTY and PUGET SOUND
ENERGY,

Respondents.

SHB NO. 06-006

ORDER GRANTING
MOTION TO DISMISS

On February 24, 2006, the Petitioners filed a Petition for Review of the February 10, 2006 Skagit County decision affirming the Skagit County Hearing Examiner's approval of Puget Sound Energy's application for exemption from the permit requirements of the Shoreline Management Act. On March 10, 2006, Respondent Puget Sound Energy filed a Motion to Dismiss for Lack of Jurisdiction. The parties appeared on April 18, 2006 and made oral argument before the Board. Attorney Scott Thomas appeared on behalf of the City of Burlington. City Attorney Kevin Rogerson appeared on behalf of the City of Mount Vernon. Attorney John Schultz appeared on behalf of Skagit County Dike, Drainage and Irrigation Improvement District No. 12, and Skagit County Dike District No. 1. Markham A. Quehrn and

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SHB 06-006

Kristine Wilson appeared on behalf of Puget Sound Energy. Petitioners Skagit County Dike District No. 17 and Skagit County did not participate in the oral argument.

The Board considering the Motion to Dismiss was comprised of William H. Lynch, Chair, and Kathleen D. Mix, Judy Wilson, Peter Philley and Mary Alyce Burleigh, members. Cassandra Noble, Administrative Appeals Judge, presided for the Board. Kim Otis of Gene Barker & Associates, Inc. provided court reporting services at oral argument. The Board reviewed and considered the arguments of the parties and the pleadings and other motion papers contained in the Board record including the following:

1. Respondent Puget Sound Energy, Inc.'s Motion to Dismiss for Lack of Jurisdiction and exhibits;
2. Declaration of Kristine R. Wilson in Support of Respondent Puget Sound Energy, Inc.'s Motion to Dismiss for Lack of Standing;
3. Petitioner City of Burlington's Response to Respondent Puget Sound Energy's Motion to Dismiss for Lack of Jurisdiction and exhibits; and
4. Puget Sound Energy, Inc.'s reply to Petitioners' Response to PSE'S Motion to Dismiss for Lack of Jurisdiction.

FACTUAL BACKGROUND

Respondent Puget Sound Energy, Inc. (PSE) is seeking re-licensing from the Federal Energy Regulatory Commission (FERC) of the Baker River Hydroelectric Electric Project. The previous license had been in place for 45 years and was set to expire on April 30, 2006. PSE is

1 seeking renewal of the license and approval to install new turbines, put in place water storage
2 protocols for the Lower Baker Reservoir in Lake Shannon, substantially increase flow regimes
3 for the length of the Skagit River, construct a \$50,000,000 fish hatchery, make facilities
4 improvements, install a boat launch, augment gravel, construct a trail and other activities. Skagit
5 County (the County) informed PSE that it was required to apply for a shoreline substantial
6 development permit for the project in order to receive a “consistency determination” from the
7 State of Washington Department of Ecology (Ecology). The consistency determination will be
8 required in the license application for the Federal Energy Regulatory Commission (FERC) re-
9 licensing. The FERC cannot issue a license for a hydropower project in the State of
10 Washington’s coastal zone without complying with the Coastal Zone Management Act of 1972
11 (the CZMA). *16 U.S.C. §§1451 -1465*. Pursuant to the CZMA, Ecology has been delegated the
12 authority to determine whether a proposed project is consistent with the State Coastal Zone
13 Management Program (CZMP). The SMA, its implementing regulations and the local shoreline
14 master programs are all federally approved enforceable policies of the state’s CZMP. *RCW*
15 *90.58.300. Petitioners’ Response to Respondent Puget Sound Energy’s Motion to Dismiss for*
16 *Lack of Jurisdiction, Exhibits 4 and 10.*

17 Petitioners assert that PSE exchanged correspondence with the County in the spring of
18 2004 concerning the consistency certification process under federal and state coastal zone
19 management requirements. In this correspondence, PSE expressed an intention to obtain
20 whatever shoreline permits that the County required. At that time, the only focus of concern was

1 whether County shoreline permits needed to be obtained prior to or after Ecology's consistency
2 determination. *Petitioners' Response to Respondent Puget Sound Energy's Motion to Dismiss*
3 *for Lack of Jurisdiction, Exhibits 10, 11, 12 and 13.* Then, on March 15, 2005, PSE submitted a
4 shoreline exemption application to the County, which the County denied on April 12, 2005,
5 requiring PSE to obtain a shoreline conditional use permit for the proposal. *Petitioners'*
6 *Response to Respondent Puget Sound Energy's Motion to Dismiss for Lack of Jurisdiction,*
7 *Exhibit 14.* PSE appealed the exemption denial to the Skagit County Hearing Examiner on May
8 20, 2005. On October 5, 2005, the Skagit County Hearing Examiner issued Findings of Fact,
9 Conclusions of Law and Decision granting PSE's appeal. *Petition for Review, Ex. B.* The
10 Examiner also denied reconsideration on October 17, 2005. Petitioners appealed the Hearing
11 Examiner's decision to the Skagit County Board of Commissioners, which denied the appeal on
12 February 6, 2006 by Skagit County Resolution No. R20060048. *Petition for Review, Ex. C;*
13 *Petitioners' Response to Respondent Puget Sound Energy's Motion to Dismiss for Lack of*
14 *Jurisdiction, pages 7 & 8.* This appeal followed.

16 ANALYSIS

17 Respondent PSE asserts that the Board is without jurisdiction to consider the appeal of a
18 local government's shoreline exemption determination. Petitioners argue that, because this case
19 arises in the context of the Federal Power Act, 16 U.S.C. §791a, *et seq.* (the FPA), and the
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1 Coastal Zone Management Act, 16 U.S.C. §1451 *et seq.* (the CZMA), the Board has jurisdiction
2 over the County's exemption decision.

3 The Board has jurisdiction over appeals of the "granting, denying, or rescinding" of a
4 permit. RCW 90.58.180(1). In interpreting this statute, the Court of Appeals has made it clear
5 that an exemption decision is outside the Board's jurisdiction. *Putnam v. Carroll*, 13 Wn.App.
6 201 (1975). In *Putnam*, a property owner sought a writ of mandamus to compel a county to issue
7 construction permits on a parcel of property in a plat that had been approved prior to the 1971
8 enactment of the Shoreline Management Act (SMA). In addressing the argument that Putnam
9 failed to exhaust his administrative remedies by appealing to the Shorelines Hearings Board prior
10 to turning to Superior Court, Division 3 of the Court of Appeals held that:

11 RCW 90.58.180(1) provides for appeals by any person aggrieved by the granting
12 or denying of a permit on shorelines of the state, or rescinding a permit...' If the
13 appeal of one who seeks to establish exemption from permit requirements is
14 upheld, no permit is necessary since the statute is therefore not applicable.
Putnam is not 'aggrieved by the Granting or Denying of a permit,' ...but rather by
the Denial of an *exemption from permit requirements; a situation which was*
apparently not contemplated by the statute.

15 *Putnam v. Carroll*, 13 Wn.App. 201, 534 P.2d 132 (1975).

16 Since Putnam, the Board has consistently held that, unless an exemption decision is made
17 in conjunction with a permit decision, it has no jurisdiction over a local government's shoreline
18 exemption determination. *See Preserve Our Islands v. King County*, SHB No. 04-009 & 04-010
19 (2004); *Estes v. Stevens County*, SHB No. 03-026 (2003); *Kauppila v. Pierce County*, SHB No.
20 03-027 (2003). The Washington Supreme Court has affirmed that a decision by a local

1 government that a development project that does not fall within the jurisdiction of the Shoreline
2 Management Act is not within the jurisdiction of the Board.

3 ...a decision by a local government, ...that a development project does not fall
4 within the jurisdiction of the SMA, is not reviewable by the SHB. RCW
5 90.58.180 (only providing SHB with authority to hear appeals only on decisions
to *grant, deny, or rescind* a substantial development permit); *Toandos Peninsula*
Ass'n v. Jefferson County, 32 Wn.App. 473, 485, 648 P.2d 448 (1982).

6 *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2003).

7 Petitioners assert that the FERC application process' requirement for a Coastal Zone
8 Management Act consistency determination brings this case within the Board's SMA
9 jurisdiction. Nevertheless, pursuant to the plain language of the SMA, this Board clearly has
10 jurisdiction only over permit decisions. RCW 90.58.180(1). The Board cannot, by reaching
11 beyond the plain language of its enabling statute, provide itself with more jurisdiction than it has.
12 The Petitioners are not precluded from filing an appeal with the Environmental Hearings Office
13 challenging a subsequent determination by Ecology that this project is consistent with the
14 CZMA.

15 Therefore, based on the foregoing analysis, dismissal of this matter is required. Now,
16 therefore, the Board enters the following

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SHB 06-006

1 **ORDER**

2 Respondent Puget Sound Energy's Motion to Dismiss for lack of jurisdiction is
3 GRANTED.

4 SO ORDERED this 14th day of June, 2006.

5 SHORELINES HEARINGS BOARD

6 WILLIAM H. LYNCH, Chair

7 KATHLEEN D. MIX, Member

8 JUDY WILSON, Member

9 PETER PHILLEY, Member

10 MARY ALYCE BURLEIGH, Member

11 CASSANDRA NOBLE, Presiding
12 Administrative Appeals Judge